

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

FEB 27 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2006-0291-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MARK STEPHEN BRASHIER,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20031139

Honorable Kenneth Lee, Judge

REVIEW GRANTED; RELIEF DENIED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and John R. Evans III

Tucson
Attorneys for Respondent

Mark S. Brashier

Florence
In Propria Persona

B R A M M E R, Judge.

¶1 After pleading guilty in 2004, Mark Brashier was convicted of two counts of attempted sexual exploitation of a minor under the age of fifteen and one count of luring a minor for sexual exploitation. The trial court sentenced him to a presumptive term of ten

years' imprisonment on the attempted sexual exploitation conviction and suspended the imposition of sentence and placed Brashier on lifetime probation for the other two convictions.

¶2 Brashier filed his second notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., in October 2005.¹ In his subsequent post-conviction petition, Brashier maintained his counsel had been ineffective in negotiating the plea agreement, in informing Brashier of its consequences, and in presenting mitigating circumstances to the court. According to Brashier, his counsel “guaranteed him a five year sentence when the plea agreement called for a five to fifteen year sentence that was capped at ten years.” Brashier also alleged the trial court erred by failing to properly weigh mitigating factors when imposing sentence. The court denied relief and dismissed the petition.

¶3 In his petition for review, Brashier contends the trial court abused its discretion, arguing a sentence of greater than five years breached an oral promise made to him and violated his right to due process. He also claims his attorney was ineffective in

¹Brashier filed his first notice of post-conviction relief in July 2004. Appointed counsel notified the trial court that he could find no meritorious claims to raise, and the court afforded Brashier an opportunity to file a pro se petition, consistent with *Montgomery v. Sheldon*, 181 Ariz. 256, 261, 889 P.2d 614, 619 (1995). In June 2005, Brashier moved to dismiss his post-conviction proceeding, and the court dismissed it pursuant to Rule 32.5, noting that no petition had been filed. Four months later, Brashier wrote to the court that his motion to dismiss had been based on bad advice from another inmate, and he requested another opportunity to file a petition. Brashier also filed a new notice of post-conviction relief. The court then granted Brashier leave to file a petition pro se on his second notice of post-conviction relief.

failing to have this promise reduced to writing and in explaining the consequences of the plea agreement.² We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find none here.

¶4 Brashier did not raise a due process argument in his petition for post-conviction relief. We will therefore not address it on review. *See, e.g., State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court does not consider issues first presented in petition for review that “have obviously never been presented to the trial court for its consideration”). As for Brashier's claims of ineffective assistance of counsel, the trial court denied relief in a thorough order that identified Brashier's arguments and ruled on them in a manner that is factually supported by the record before us and legally supported by the authorities cited therein.

¶5 As described in the trial court's order and confirmed by the transcript of the change-of-plea proceeding, the court had questioned Brashier at length during the hearing, and Brashier had confirmed he was voluntarily entering a plea of guilty in accordance with a plea agreement that he had read and understood, that his attorney had explained to him,

²Additionally, Brashier argues the trial court erred by granting the state an extension of time in which to respond to his petition, based on the state's representation that it had received the petition only after the deadline had passed for the state's response. We find no abuse of discretion in the trial court's determination that an extension of time was justified by this extraordinary circumstance. *See* Ariz. R. Crim P. 32.6(a). We also reject Brashier's suggestion that he is entitled to relief based on an obvious typographical error in the introductory paragraph of the court's order.

and that was consistent with the promises he understood the state had made. In his post-conviction proceeding, Brashier maintained that despite his responses at the hearing, he was entitled to be resentenced because counsel “was ineffective by telling defendant to tell the judge that no guarantee had been made or the judge would reject the plea.” The signed plea agreement and the change-of-plea hearing transcript provide no support for Brashier’s allegations, and our supreme court has cautioned against granting relief under these circumstances, where a defendant claims after sentencing that he lied to the court during a change-of-plea hearing. *See State v. Hamilton*, 142 Ariz. 91, 93, 688 P.2d 983, 985 (1984) (defendant, who stated guilty plea was voluntary, foreclosed from later claiming it was coerced; to grant relief “would make a mockery of our justice system and of course will not be allowed”).

¶6 Moreover, as the trial court correctly concluded, Brashier failed to show any prejudice from counsel’s alleged improper conduct, and such a showing is required to state a colorable claim for ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). The lack of prejudice is apparent from the relief Brashier seeks—a “modif[ication of] his sentence downward to reflect a mitigated sentence of two and a half years from the current presumptive ten year sentence, or to a five year sentence per the plea agreement.” Brashier has never suggested that but for his attorney’s alleged improprieties, he would have rejected the plea agreement and entered a plea of not guilty. Therefore, the trial court did not abuse its discretion in concluding that

Brashier had failed to state a colorable claim of ineffective assistance of counsel. *See Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985) (to satisfy prejudice requirement of *Strickland*, pleading defendant “must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial”).

¶7 Because the trial court ruled in such a way that this court and any court in the future is able to understand Brashier’s claims and the court’s correct resolution of them, we need not repeat that analysis here. We therefore adopt the trial court’s order. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Although we grant the petition for review, we deny relief.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge